IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE

IN THE MATTER OF THE COMPLAINT OF IRENE GOHM ALLEGING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF CREED AGAINST DOMTAR INC.

AND

IN THE MATTER OF THE COMPLAINT OF IRENE GOHM ALLEGING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF CREED AGAINST THE OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 267

DECISION OF THE BOARD OF INQUIRY

WILLIAM F. PENTNEY

Appearances:

For the Commission:	David Lepofsky and Lori Sterling
For the Complainant:	Keith Juriansz
For the Company:	Keith Billings
For the Union:	Elizabeth Lennon

Introduction

Irene Gohm is a member of the Seventh Day Adventist Church. A fundamental tenet of her religion is strict observance of a Sabbath day from sundown Friday to sundown Saturday. She has observed this Sabbath since her childhood. In 1981 she was hired by the respondent company, Domtar, to work in the labratory in its pulp and paper mill in Red Rock, Ontario. Under the terms of her employment she was expected to work certain Saturdays for a half-day shift, as part of her ordinary work schedule. This requirement created a conflict between Ms. Gohm's work obligations and her religion. This case requires a determination of whether the failure to accommodate Irene Gohm's needs by virtue of her inability to work the scheduled Saturday shift contravened the Ontario Human Rights Code.

I was appointed by the Minister of Citizenship as a Board of Inquiry under the Ontario Human Rights Code on March 19, 1988. The hearing convened on April 15, 1988, at which time it was adjourned on consent until May 31, 1988 for the hearing of preliminary motions brought by the respondent Company (Domtar Inc.) and the respondent Union (Office and Professional Employees International Union, Local 267). I issued two decisions on these preliminary motions, on the issues of delay (June 14, 1988), and participation by counsel for the complainant (June 30, 1988). These decisions are appended to this decision for reference.

The hearing re-convened for the hearing of evidence on the

following dates: July 7 and 8, 1988; October 11, 12, 13; December 5 and 6, 1988; February 21, 22, 23, 24, 1989 and April 24, 1989. Final argument occurred on September 11 and 12, 1989.

During this protracted hearing I made several rulings on procedural or evidentiary matters, and it is convenient to deal with these separately from the consideration of the evidence or the substantive legal issues. As well I note here that on July 7, 1988 I acceded to the request of counsel for the Commission to discontinue the complaint against Mr. Eamer, the plant manager employed by the Company.

I Procedural Rulings

The first significant procedural ruling concerns the order of presentation of evidence and argument as between the two respondents - Domtar and the Union. The complainant filed two separate complaints with the Commission relating to the incidents in question in this hearing: one against the Company and one against the Union. I was appointed to hear both complaints, and a question arose as between these respondents about the order of presentation of evidence and argument.

Counsel for the Company argued that since the original complaint against the Union pre-dated the original complaint against the Company (both complaints were subsequently amended), and since under the Ontario Labour Relations Act, R.S.O. 1980, c. 228, any dealings by the Company with respect to attempts to

accommodate the complainant had to involve the Union, the Union should precede the Company in the order of presentation.

Counsel for the Union argued that the complaint here involved the termination of employment of the complainant, and since that was the sole prerogative of the Company, the Union's involvement in this matter was, at best, derivative or secondary to the Company's responsibility. The Union argued that the Company should bear primary liability because it developed the work schedule at issue in this case and it made the decision to terminate the complainant. The Union also argued that the provisions of the Code which were allegedly breached in this case, paragraphs 4(1)(b) and (g), could not apply to the Union. For these reasons, the Union argued that it should follow the Company in the presentation of evidence.

The Commission supported the Union's argument that it would be most appropriate for the Company to present its case first, because Domtar's termination of the complainant's employment precipitated the complaint, and because the Commission's case in favour of the Union's liability would only be evident after the Company's evidence about its conduct was presented. Counsel for the complainant simply adopted the arguments of the Commission.

I ruled that the Company should present its arguments and evidence before the Union, because on the basis of the outline of the case presented by the Commission and concurred in at least in general terms by the other parties, it appeared convenient and appropriate to have the Company present its evidence relating to

the termination and the events surrounding the termination before hearing from the Union. The rule which was alleged to be discriminatory here was the shift schedule, and the event which gave rise to the complaint was the termination of the complainant by the Company. In this factual context it appeared to me to be appropriate to call upon the Company first, and then to hear the Union's evidence. This ruling addresses an issue which does not appear to have been the subject of formal rulings in other human rights boards of inquiry, and it was based on the particular factual context of this decision.

The second procedural ruling concerned the presentation of evidence by the Ontario Human Rights Commission (the Commission). At the outset of the hearing of evidence, counsel for the Commission asked for directions from the Board on this point. This issue arose because this complaint alleged adverse effect discrimination on the basis of religion, contrary to s. 4 of the Ontario Human Rights Code, R.S.O. 1980, c. 340. The Commission sought directions on the propriety of its proposed course of action, which was to present evidence only about the allegation of adverse effect discrimination and discussions held about reasonable accommodation, and not to call any evidence about whether the Company or Union could have reasonably accommodated the complainant without incurring undue hardship.

The Commission proposed to establish a prima facie case of adverse effect discrimination, mainly through testimony by the complainant. This, it argued, would shift the onus to the

respondents to establish that reasonable accommodation was not possible in this case because the accommodation would cause undue hardship. The Commission sought to be in a position to respond to the Company and Union on this point, by calling further evidence on possible accommodation of the complainant. And the Commission acknowledged that this might entail re-calling the complainant as a witness.

The essence of the problem identified by counsel for the Commission, Mr. Lepofsky, was that if evidence on reasonable accommodation and undue hardship was called by the Commission in its case in chief, and later called into question by evidence presented by the Company, the Commission would be barred from calling further corroborative evidence on these points in reply under the usual rules concerning case splitting. And so the Commission was in the position of having to anticipate the Company's and Union's evidence on this point without the benefit of particulars or formal disclosure, such as are available in civil actions. Counsel for the Commission argued that its proposed course of action would not cause either respondent hardship because he offered to undertake to re-call the complainant in reply if the respondents undertook not to cross-examine her during the case in chief on the issue of what accommodations were possible or feasible. Thus, he submitted both respondents were guaranteed an opportunity to cross-examine the complainant on this issue, and to challenge the Commission evidence on the matter.

The Commission argued that under the law established by the Supreme Court of Canada in **Ontario Human Rights Commission v. Simpsons-Sears Ltd.**, [1985] 2 S.C.R. 536 (the **O'Malley** case), it merely had to establish a prima facie case of adverse effect discrimination on the basis of creed, and then the legal onus shifted to the respondents to call evidence to defend its conduct by establishing that reasonable accommodation was not possible. This legal framework was invoked by the Commission to support its postition with respect to the presentation of evidence.

The Company objected to this proposal. The Company argued that from the beginning of this case all parties have been aware that it is essentially about reasonable accommodation and undue hardship, and that in order to minimize the complexity of the case all of the Commission's evidence should go in at the same time. Counsel for the Company argued that since the Commission had the benefit of an extensive investigation record, fact-finding reports and interviews with all of the principals involved from Domtar, it could not argue that it had no knowledge of the evidence the Company would call on this point.

The Union took no position contrary to the position put forward by the Commission on this point. Counsel for the complainant argued in support of the Commission's proposal, and pointed to the unfairness that would arise if the complainant was forced to anticipate the evidence that would be lead by the respondents on the issue of undue hardship, in the absence of full disclosure by the respondents.

This issue illustrates the extent to which this case involves new questions of law and procedure in Canadian human rights law. The proposal put forward by the Commission was a novel and interesting one, but I ruled that the Commission should put all of its evidence in at once, rather than proceeding to divide the case between evidence about adverse effect discrimination and requested accommodations, and evidence about possible accommodations and undue hardship. Although in law a board of inquiry is not bound by the formal rules of evidence or civil procedure, these rules offer a convenient and appropriate guideline to the resolution of an issue such as this. It does not appear to create an unfair advantage for any party to require the Commission to call all of its evidence about adverse effect discrimination and to address the issue of accommodation and undue hardship in its case in chief, and I ruled that this was to be done in this case. I also ruled that if the Commission or the complainant decided to call evidence in rebuttal of specific evidence called by the respondents with respect to undue hardship, I would permit that to be done. As matters transpired, this was not requested.

The basic rationale for this ruling is that it was convenient and appropriate to hear as much evidence as possible from the complainant and the Commission about the key issues in the case, which involved both adverse effect discrimination and reasonable accommodation short of undue harsdhip. On the basis of the outline of the case presented by the Commission, it was

evident that the key issue in this case is the extent to which accommodation of the complainant was possible, or available, or tried, or refused, and who bears responsibility for that. Thus I ruled that the Commission should lead evidence about all of these elements of the case during its case in chief.

The next significant procedural ruling concerned the admissability of photocopies of newspaper advertisements which the respondent Company sought to introduce during its cross-examination of the complainant on the issue of mitigation of damages. The complainant in this case seeks damages for lost income over an extended period of time, from October 1981 until March 1987, when she obtained another job. She was questioned about her job search following her termination by Domtar in her examination in chief, and a subpoena of her records of this was issued at the request of the Company. When it transpired that almost all of these documents had been lost when the complainant moved from Red Rock to Toronto, counsel for the Company and Union moved to have the case dismissed on the basis that they were thereby prejudiced in the presentation of their defence due to delay. I ruled against this motion, on the basis that the loss of documents did not affect the presentation of the prima facie case, nor did it preclude the respondents from making out their defence to the allegation. The loss of these documents, though regrettable, ultimately prejudiced the complainant and respondents alike, in that it made proof of her efforts to mitigate her damages more difficult.

It was in the context of this factual background that I was asked to admit as evidence photocopies of newspaper advertisements which had appeared in local newspapers during the period 1981 until 1987. Counsel for the Company proposed to put these advertisements to the complainant and to ask whether she recalled seeing the advertisement, and whether she applied for the position advertised. Counsel for the complainant and the Commission strenuously objected to this course of action. They submitted that if the complainant could not identify the advertisement or did not recall seeing it, I should not admit it into evidence. Furthermore, they argued that the advertisement could not be accepted as proof of its contents, in the sense that it could not be used to establish that the position advertised was actually available. In order to prove that, they submitted, the Company would have to call as a witness someone with personal knowledge of that fact. The Company frankly admitted that it would not be able to produce such witnesses, given that these advertisements dated from 1981 onwards.

I ruled that the advertisements were admissable, on the understanding that the Company would produce an affidavit from the person who obtained the photocopies of the newspapers. This was subsequently done by the Company: Exhibit 46. I also ruled that the advertisements would be taken as proof of their contents, in view of the delay which had transpired in this case and the obvious difficulties that it would put counsel for the Company if he were required to prove the contents of these

advertisements. In my view, section 15 of the Statutory Powers Procedures Act, R.S.O. 1980, c. 484 authorizes a tribunal to admit as evidence in a hearing any document or thing relevant to the subject matter whether or not it would be admissable in a court of law. In the unique circumstances of this case as described earlier, and in particular given the lengthy delay which had transpired, the nature of the complainant's claim for damages for loss of income, and the loss of her documents, I ruled that this evidence was admissable.

If I was wrong to rule that this evidence should be received as proof of its contents, that would not affect the relevance of this evidence and my ruling on the admissablity of this evidence on the issue of mitigation of damages would still stand. In my view, even if the advertisements were not actually placed by the companies whose names appeared therein, or even if the jobs advertised were not available in every case, the question of whether she saw the ads and pursued inquiries about the positions advertised is relevant to the question of mitigation.

I also ruled on a motion to quash a summons issued to Mr. Eamer at the request of the Commission and the complainant pursuant to sub-section 12(1) of the Statutory Powers Procedure Act. This summons required Mr. Eamer to produce, inter alia:

> All files, records or documents in the possession or control of the respondent Domtar Inc., its officers, agents or employees regarding the employment and dismissal of the complainant, Irene Gohm, with the said respondent, described hereafter:
>
> 1. All files, documents, records and memoranda dealing with efforts taken or contemplated to be taken or refused t

> taken by the said respondent to accommodate the religious beliefs and practices of the complainant between August 12,1981 and October 10, 1981;
> ...
>
> 3. All files, documents, records and memoranda regarding discussions or negotiations with the [Union]... with respect to the issue of accommodating the religious beliefs and practices of the complainant between August 12, 1981 and April, 1982.
>
> 4. All notes taken by or on behalf of Robert Eamer between the period of May 1981 and May 1982 with respect to the complainant's request to be accommodated or with respect to discussions with the complainant or with representatives of [the Union]... or with any employee or agent of Domtar Inc. which deal in whole or in part with the complainant's request to have her religious beliefs accommmodated or with respect to the requirement that the complainant work on a rotating Saturday shift or with respect to the discipline or dismissal of the complainant.

Counsel for the Company argued that this summons should be quashed because it was too vague, and did not meet the requirements set out in **Re Dagleish and Basu** (1974), 51 D.L.R. (3d) 309, which have been adopted by Boards of Inquiry under the Ontario Human Rights Code. The Company argued that it was unnecessary and duplicative for the Commission and complainant to request that I issue duplicate summonses, and for that reason he argued that the one issued at the request of the complainant should be quashed. I acceded to this request, because I viewed it as inappropriate to have the same person subject to identical summonses.

I refused to quash the summons issued at the request of the Commission, however, because in my view it was not so broad or vague as to prejudice the respondent. The legal tests and practical considerations which are relevant to motions to quash

a summons have been adequately discussed in other board of inquiry decisions, and I do not propose to engage in a lengthy analysis of this issue: see **Johnson v. East York Board of Education** (Ont., 1988); **Olarte et al. v. Commodore Business Machines Ltd.** (1983), 4 C.H.R.R. D/1705; **Bezeau v. O.I.S.E.** (1982), 3 C.H.R.R. D/874; **Joseph v. North York General Hospital** (1982), 3 C.H.R.R. D/854; and **Niedzwiecki v. Beneficial Finance Ltd.** (Ont., 1981). I ruled that the summons sufficiently identified the material to be produced, that the description met the standard of "reaonable distinctiveness" set out in the case-law, and further that the Commission was not precluded from requesting such a summons by virtue of its investigative powers under the Code. The Company had argued that this summons should be quashed because the Commission had previously had ample opportunity to obtain these documents during its investigation of the complaint, and it cited **Joseph v. North York General Hospital**, supra. in support of this argument. I find the reasoning in **Joseph** to be compelling, and I would be prepared to adopt in in an appropriate case. In the circumstances of this case, however, I ruled that the summons identified with sufficient particularity material which would be directly relevant to the basic issues in dispute, and for that reason I upheld the summons.

II The Evidence

The complainant, Irene Gohm, is a member of the Seventh Day Adventist Church. She was born into a family of adherents to this faith, and her father was a member of the clergy of the Church. A fundamental tenet of this faith is observance of the Sabbath day from sundown Friday until sundown Saturday. The importance of the Sabbath in this faith is indicated by the fact that it is part of the very name of the Church. Observance of the Sabbath requires that church members refrain from work, and wherever possible attend Church services or functions. The only exception to the rule regarding abstention from work relates to work for the preservation of life.

Ms. Gohm applied for a position at Domtar's Red Rock pulp and paper mill which was advertised in the Nipigon Gazette in May, 1981 (Exhibit 10). The position was as a Junior Laboratory Technician. Although she did not have any previous experience in this type of work, the complainant did possess a Bachelor of Science degree and a Bachelor of Education degree from the University of Toronto. She telephoned the lab supervisor, Mr. Dupuis, and inquired about the job. She was interviewed for the position by Mr. Dupuis and Mr. Gichard, the Superintendent of the Technical Services Department. During the interview the nature of the job was explained to Ms. Gohm, including the requirement that lab technicians work on Saturdays on a rotating basis.

The complainant did not indicate during the interview that

her religion prevented her from complying with the Saturday shift requirement. She testified that she thought that if she revealed this problem at that time she would not be hired for the position, and further that she hoped that an arrangement could be made to accommodate her needs. She based this assessment on the description of the work required of a lab technician.

Following this interview, the complainant was offered the position of junior lab technician. The job offer was made in late May or early June of 1981, but the complainant asked that her commencement date be postponed because she and her husband had previously arranged holidays during the summer. The company acceded to this request, and the complainant's first day of work at Domtar was August 12, 1981. It is useful to review the nature of the responsibilities associated with her job, before reviewing the sequence of events that transpired after she began work.

The laboratory in the Red Rock operation is part of the Technical Services Department. It is responsible for various types of testing in the plant, including air quality, air emissions, and aequeous emissions or effluent testing.

The evidence indicates that effluent testing was one of the major responsibilities of lab technicians. It involved collecting samples of effluent from the mill, and subjecting these samples to various tests to determine certain properties of the effluent. This testing is required of Domtar in order to comply with provincial environmental standards, and specifically to comply

with a Ministry of the Environment Control Order issued in 1980 (Exhibit 121). The test results were formulated in a report which was reviewed by the lab supervisor, and eventually forwarded to the plant manager at the Red Rock operation, Mr. Eamer. If the results indicated a problem in a particular area of the mill this could be brought to the attention of the appropriate personnel by the technician or lab supervisor, so that the problem could be rectified. The purpose of this testing was to minimize emissions from the plant, and it also provided a record of the emissions from the plant.

The lab also tests the quality of the paper products produced at the mill, and engages in air quality testing as required. The normal complement of lab technicians is six, together with two process engineers, a senior lab technician and the lab supervisor. The junior or intermediate technicians are scheduled to work Monday to Friday during office hours, and on a rotating basis they work a half-day shift on Saturday. During this Saturday shift the samples which were collected on the previous day are tested, and Saturday samples are collected. The Saturday samples, and those collected on Sunday, are tested on Monday morning, and the reports are then prepared. This lapse of 24 hours did not affect the chemical or other properties of the samples, or otherwise impair the validity of the tests.

The employee who works on the Saturday normally receives the regular rate of pay, or "straight time" as it was referred to during the hearing. That employee is allowed to take off a half

day on the following week, usually the Friday afternoon, although another time could be arranged with the approval of the lab supervisor.

The employees in the lab are members of the Union, local 267, whose president in 1981 was Miss McCabe. There are several other unions that represent workers in other areas of the Red Rock operation. The Collective Agreement that covered Ms. Gohm's employment included a reference to this Saturday shift rotation in article 9.05: "At present, a work schedule is maintained in the Technical Services Department to service Saturday shift requirements. Departmental discussions will be held if a change in this or other departments is necessary."

Ms. Gohm commenced work on August 12, 1981. From the evidence of the complainant and Mr. Eamer, on behalf of the Company, it is clear that she was regarded by her supervisor as an excellent employee; he had referred to her as a "model" employee. However, when the first Saturday shift schedule for the lab was posted on September 9, indicating that Ms. Gohm was scheduled to work on October 10, she approached the lab superintendent, Mr. Gichard, and revealed that her religion prevented her from working on the Saturday. Mr. Gichard asked the complainant why she had not revealed this during her interview, and she explained that she thought if she did she would not be offered the position. The complainant asked for his help in making arrangements to accommodate her beliefs. In particular the complainant raised the accommodation that would become the focus

of discussions for the following month, namely allowing her to do the scheduled Saturday work on Sunday instead. Mr. Gichard agreed with her that there were no technical problems that would prevent the testing from being done on Sunday instead of Saturday.

Mr. Gichard agreed to pursue the matter, and shortly afterwards he told the complainant that there may be a problem with the Union, and that the president of the Union local, Miss McCabe, would come to see her. Miss McCabe spoke with the complainant about the situation, and Ms. Gohm explained that her religion prevented her from working on Saturday. Ms. Gohm asked for Miss McCabe's assistance in arranging an accommodation. From the testimony it appears that the complainant did not explain the Sabbath rules of the Seventh Day Adventist Church in any detail at this time, but rather she indicated in general terms that her religion prevented her from working on Saturday.

According to the complainant's testimony, the Union's initial response was favourable. Miss McCabe told her that the Union would agree to allowing Ms. Gohm to work on Sunday instead of Saturday, but this arrangement should be "kept quiet". This version of their initial discussion is not consistent with the testimony of Miss McCabe, but it is not necessary to resolve this discrepancy because there is agreement that the Union's position soon crystallized, following a meeting between Miss McCabe and Mr. Seagris, the Superintendent of Personnel for the Company.

The evidence of Mr. Eamer, for the Company, and Miss McCabe,

for the Union, indicates that Mr. Seagris was not in favour of making an arrangement to accommodate Ms. Gohm. He feared that if an accommodation was made to suit her needs, similar requests would be forthcoming from others, specifically Jews and members of the Ukranian Orthodox Church. Mr. Eamer testified that despite this opposition from Mr. Seagris, he instructed him to discuss the matter with Miss McCabe in order to determine whether an accommodation could be arranged along the lines suggested by Ms. Gohm, that is, allowing her to work on Sunday instead of Saturday. At this meeting, which occurred shortly after September 9, according to the account provided later to Mr. Eamer by Mr. Seagris, the Union raised concerns about whether this accommodation would establish a precedent, and furthermore Miss McCabe stated that the Union would not accept an accommodation that would allow the complainant to work on Sunday at straight time or regular pay. Miss McCabe testified that she had been puzzled when Mr. Seagris asked her to attend this meeting, because she was under the impression that the Company had already determined that it would not amend or re-open the Collective Agreement, and thus it was not possible to accommodate Ms. Gohm's request to work on Sunday at straight time.

It is not necessary to resolve the dispute about what exactly transpired at this meeting, because its end result was clear: there was no agreement between the Union and the Company to allow Ms. Gohm to work her scheduled Saturday shifts on the following Sunday, at straight time pay.

According to the testimony of Ms. Gohm and Mr. Eamer, the Company had adopted the view that since the lab technicians recieved straight time pay when they worked their scheduled Saturday shifts, it would be unfair to these employees to pay Ms. Gohm the premium rate for overtime work (at a rate of time and one-half) for doing the same work on Sunday. The Company's views of the situation were summarized in a memorandum from Mr. Gichard to Mr. Seagris dated September 23, 1981 (Exhibit 123), where it is indicated that Ms. Gohm had requested that her weekend work be scheduled on Sunday at straight time to accommodate her religion, and that the Union objected to this because of the Collective Agreement. The memorandum continues:

> 4. While the whole notion of changing established schedules to suit the requirements of individuals is by and large unpalatable Mrs. Gomm's (sic) reason is acceptable if we allow that **any** reason is acceptable. Her ability and performance to date indicate that she would in all likelihood become a model Lab Technician.

The memorandum ends by stating that if nothing changes the Company would have no choice but to terminate the complainant's employment because of her inability to do the scheduled work.

The Union's position was that the Collective Agreement stipulated that any work done on Sunday was to be paid at the overtime rate (Exhibit 9, art. 10.03), and unless the agreement could be modified the Union was bound to uphold it. Miss McCabe testified that she had discussed Ms. Gohm's case with Mr. Eamer prior to her meeting with Mr. Seagris, and that he had stated unequivocally that under no circumstances would the Collective Agreement be re-opened. This testimony is contradicted by the

testimony of Mr. Eamer, and it is inconsistent with the evidence of Ms. Gohm, who testified that she first raised the issue of her religious objection to the Saturday shift on September 9 when the shift schedule was posted. I found Miss McCabe to be a credible and forthright witness, and I believe that this discrepancy is simply attributable to the fading of memory associated with the passage of time between the events in question and the hearing.

It would appear that Miss McCabe's recollection of her discussion with Mr. Eamer in which he stated that the Collective Agreement would not be re-opened actually occurred before Ms. Gohm's problem had surfaced. There had been considerable friction between the Company and the Union in this period of time arising from the handling of a grievance relating to the refusal by the Company to grant an employee a leave of absence. Problems had also arisen because Miss McCabe had taken a stand against the practice of negotiations between supervisors and employees about leaves of absence - what Miss McCabe called "wheeling and dealing". In the period from 1979 - 80 onwards, Miss McCabe became aware of agreements between supervisors and employees to the effect that the employee would be granted a leave of absence in return for an agreement to work extra hours to pay back the time off. These employees would then work these extra hours at straight time. Miss McCabe believed that this was contrary to the Collective Agreement, which required overtime pay for work done over and above the normal working hours, and she also felt that it was improper for such agreements to be made between indivi

employees and supervisors, without the involvement of the Union. She testified that she had taken a stand against this practice with the Company, and it is likely that if she had discussions with Mr. Eamer on the issue of opening the Collective Agreement before September 9, the subject of discussion would have been this matter of leaves of absence and overtime pay.

Miss McCabe testified that after the meeting with Mr. Seagris she discussed the situation with the local Union Executive following its regular meeting on September 10. At this meeting it was agreed that if the Company would not re-open the Collective Agreement, the accommodation of Ms. Gohm along the lines suggested was not possible because it would contravene the Collective Agreement. Miss McCabe then discussed the situation with Ms. Gohm, and informed her that the accommodation that would permit her to work on Sunday would require a change in the overtime clause in the Collecive Agreement. The testimony of Miss McCabe and Ms. Gohm indicates that during this discussion the history of friction between the Company and Union was also mentioned. Ms. Gohm also testified that Miss McCabe told her that Mr. Seagris had mentioned the problem of setting a precedent: that if Ms. Gohm was accommodated the Company would also have to accommodate the Ukranians and Jews.

The testimony of all of those directly involved in these discussions is consistent on one point: Ms. Gohm asked repeatedly for assistance from the Company and Union in resolving this problem, and she indicated a willingness to accept any

accommodation that was offered. According to Ms. Gohm's evidence and that of Mr. Eamer, she had concurred with the Company's view that it would be unfair to the other lab technicians for her to receive overtime pay for doing the same work that they received. She did not demand overtime pay, but she also indicated a willingness to receive it if that was necessary to accommodate her needs. Ms. Gohm testified that she also discussed the option of swapping shifts with other lab technicians, and this was also raised by Miss McCabe. According to the evidence, these were the options that were under active consideration at this point in time.

The evidence as to each of the meetings or discussions that occurred between September 9 and September 23 is sketchy, as may be expected given the passage of time between these events and the date of the hearing. Ms. Gohm testified that she had several discussions with Mr. Gichard and Miss McCabe in this period, during which she repeated her requests for assistance in finding an accommodation. Ms. Gohm also testified that she had requested that a meeting be arranged between herself, the Company and the Union. Miss McCabe produced her notes of the meetings on September 9, 10 and 11 which have been outlined earlier (Exhibit 136). These notes reveal that the Union was of the view that the Company had previously "refused to open the contract for any change" and that "Mr. Eamer, Domtar's President had indicated that no changes whatsoever would be made for anyone, outside of the already existing contract, & he had been very emphatic about

it." The notes also state "The general consensus [of the Union] was Irene Gohm working Sun. instead of Sat. was fine, as long as the labour agreement is adhered to. Eamer refuses to open contract."

Mr. Eamer testified that he remembers meeting Ms. Gohm twice, and he produced notes of one of these meetings, which are consistent with the previous discussion of the Company's position (Exhibit 129). These notes indicate that at this point in time Mr. Eamer was informed by Mr. Gichard and Mr. Seagris that the Union would not agree to allowing Ms. Gohm to work Sunday at straight time because it was not in accordance with the collective agreement, and according to Mr. Gichard the Union "...told him they wouldn't go along because Company refuses to open contract to discuss 'other' things. MGG [Gichard] doesn't know what other things Union had in mind." This version is consistent with the summary of the situation contained in the memorandum from Mr. Gichard to Mr. Seagris dated September 21, 1981 (Exhibit 123).

On September 21, 1981 Mr. Gichard prepared an Employee's Quit and Release Slip for Ms. Gohm (Exhibit 126). According to the evidence this slip is used by the Company for internal purposes, and is given to the employee on the final day of work. On September 23, 1981 Ms. Gohm received a letter of termination which indicated that her last day of work would be October 9, 1981. The evidence of Mr. Eamer and Miss McCabe indicates that Ms. Gohm met with Mr. Eamer on September 23, prior to her meeting

with the Union Executive. This is consistent with the testimony of Ms. Gohm, and it corresponds to the documents filed (see Exhibits 132 and 137). According to the evidence Mr. Eamer indicated to Ms. Gohm that the Company was prepared to consider allowing her to work on Sundays at straight time, but the agreement of the Union was required for this because it contravened the collective agreement. Mr. Eamer also indicated at this meeting that it would be unfair to the other lab technicians to pay Ms. Gohm the premium or overtime rate for doing this work.

Ms. Gohm then attended a meeting of the Union Executive on September 23, at which she explained her problem and presented a letter in which she requested the assistance of the Union to allow her to work her scheduled weekend shifts on Sundays instead of Saturdays (Exhibit 13). This letter initiated an exchange of correspondence between Ms. Gohm and Miss McCabe (see Exhibits 14, 15, 16 and 17) in which the position of the Union and its understanding of the position of the Company with respect to the issue of opening the contract was explained and reiterated. This correspondence indicates the nature of the impasse that had been reached between the three parties to these discussions. Ms. Gohm believed that the Company did not object to her working on Sundays instead of Saturdays at straight time, but the Company said that the Union's consent was necessary for this to occur. The Union told Ms. Gohm that the Company had previously refused to open up the collective agreement, and it was of the view that

unless the agreement could be amended, she would have to be paid the overtime rate (time and one-half) if she worked on Sunday.

Ms. Gohm was under the impression, as indicated at point 2 of her letter of September 23 (Exhibit 13), that the Union would demand other concessions from the Company if the contract was to be re-opened. This was not specifically disputed in the Union's response of September 25 (Exhibit 14), although in her testimony Miss McCabe did specifically deny making any such suggestion of a linkage between the resolution of other issues in dispute between the Company and Union and the solution of Ms. Gohm's problem. The only other evidence on this point was Ms. Gohm's testimony that on her final day at work she approached the Union Vice-President, Mr. Petrik, and he stated to her that "if we [the Union] can't have what we want, why should you?", and the Company's perception of the Union's position that it would not agree to the accommodation because of "Mr. Currie's stand on Leaves of Absence" and because the Company "refuses to open the contract to discuss 'other' things" in Mr. Eamer's notes of his meeting with Ms. Gohm (Exhibit 129). This reference to the discussion by the Union of Mr. Currie's stand on leaves of absence relates to the ongoing dispute between the Union and the Company on this subject described earlier, and it is addressed by Miss McCabe in her letter to Ms. Gohm of September 25 (Exhibit 14). In this letter Miss McCabe explains that this was merely part of the "background history" to the situation. In her testimony Ms. Gohm indicated that she may have misunderstood

Union's position on this matter, but she was left with the impression that the Union's other demands related to overtime work issues.

After the meeting with the Union Executive on September 23, Ms. Gohm had another meeting with Mr. Eamer at which these matters were discussed. Miss McCabe also met with Mr. Eamer, and he produced notes of this meeting (Exhibit 130). These notes, which were written in the form of a transcript of the meeting, indicate that Miss McCabe sought to clarify what Mr. Eamer had said to Ms. Gohm about allowing her to work on Sunday. Miss McCabe said: "She [Gohm] is saying to me that you said you would be in full agreement with her working Sunday at straight time (instead of Saturday) - is that true?" Mr. Eamer responded:

> I said to her (Mrs. Gomb (sic)) that I would have a hard time justifying to a judge why the work had to be done on Saturday and could not be done on Sunday; and as such if the union was willing to consider the possibility of her working Sunday at straight time instead of Saturday, I would be prepared to discuss it.

According to the testimony of Mr. Eamer, the suggestion that Ms. Gohm be paid the overtime rate for working on Sunday may also have been discussed at this meeting, as well as the question of opening the collective agreement (Transcript,Feb. 21, p. 111). According to the evidence of Miss McCabe, she raised the question of overtime pay in a meeting with Mr. Eamer during which she said that the amount that the Company would have to spend in overtime pay for Ms. Gohm would be "peanuts" compared to the amount it ordinarily paid for overtime in the mill (Transcript, Feb. 23, p. 246). The impasse between the Union and the Company regarding

the accommodation of Ms. Gohm was not resolved at this meeting.

On October 8 Ms. Gohm attended a regular Union meeting of Local 267. At this meeting she was scheduled to participate in the formalities associated with becoming a Union member, by swearing a pledge or oath of allegiance to the Union. The evidence of Ms. Gohm and Miss McCabe is to the effect that a misunderstanding or disagreement arose at that meeting concerning the swearing of the oath. Ms. Gohm testified that she was informed that she would have to swear an oath on a Bible, and she indicated that for religious reasons she preferred simply to affirm. Miss McCabe testified that there was no mention of a Bible, nor was a Bible ever used for the initiation of new members; instead, members simply recited the pledge contained in the Union constitution booklet (Exhibit 140). It appears that this misunderstanding arose in part because the ceremony was described to Ms. Gohm as "taking an oath": see Exhibit 14, page 2. In any event, Ms. Gohm spoke to the membership, and presented another letter to the Union demanding assistance and reiterating her earlier requests for answers to her questions (Exhibit 17). The evidence is clear that it was not necessary for Ms. Gohm to take the pledge or oath in order to become a member of the Union, and as of the date of the meeting she was a member in good standing.

On the following day, her last day of work, Ms. Gohm sought to speak with Miss McCabe, but could not find her. Instead she asked Mr. Petrik, the Union Vice-President, if the Union would

agree to allow her to stay on the job until a solution could be arranged, and his response according to the testimony of Ms. Gohm was "if we can't have what we want, why should you?" Ms. Gohm testified that she had previously approached Mr. Gichard to ask whether she could keep her job if she could find a replacement for her shift on October 10. She testified that he replied that arranging a replacement was of no use because the Company had already decided to terminate her, and by doing so before the expiry of her probationary period it avoided the difficulties that were associated with the termination of a regular employee. According to the evidence Ms. Gohm was subject to a probationary period of sixty days, which would have expired on October 10.

Miss McCabe testified that on October 9, she approached Mr. Gichard in a "last stab" effort to prevent the termination of Ms. Gohm. She testified that by this point she had come to the view that the Company had given Ms. Gohm "the runaround", and that the Company was in a rush to terminate her before the expiry of her probationary period. Miss McCabe testified that she proposed to Mr. Gichard that the Company continue to employ Ms. Gohm until the Human Rights Commission had made a determination on the matter, and that Ms. Gohm be allowed to work Monday to Friday and excused from the Saturday shift rotation in the interim. She testified that Mr. Gichard refused to agree to this, because the Company did not want to set a precedent.

Shortly after the termination of Ms. Gohm, Miss McCabe and Mr. Petrik approached Mr. Seagris to suggest that the Company re-

hire Ms. Gohm pending a determination of the issue by the Human Rights Commission. A record of this meeting was introduced as evidence, and it indicates that the request was refused (Exhibit 18).

In February 1982 Domtar placed advertisements in local newspapers seeking applications for the position of Junior Laboratory Technician. Ms. Gohm applied for this position, and following correspondence between Ms. Gohm and Mr. Eamer (Exhibits 19 and 20) a meeting with the Company, represented by Mr. Eamer, Mr. Gichard and Mr. Scott, was eventually arranged. At this meeting the Company agreed to re-hire Ms. Gohm for the position providing she undertook to abide by the collective agreement by making herself available for work as required (Exhibit 21). Mr. Eamer testified that the Company undertook to assist Ms. Gohm to find replacements for her scheduled Saturday shifts, but it sought an assurance that if a shift swap could not be arranged Ms. Gohm would report to work. Ms. Gohm's testimony was generally consistent with this account of the discussion, and she indicated that she could not provide the assurance requested by the Company. As a result, she was not re-hired by the Company.

The matter was again discussed at a meeting between the Union and Company on March 1, 1982, but the parties still could not agree to an accommodation about the rate she would be paid for Sunday work (Exhibit 124).

After the termination of her employment Ms. Gohm engaged in a fruitless job search for several years. Her son was born in

1982. As well, during this period her husband became ill with cancer, which was was diagnosed in 1983, and in 1986 his condition worsened progressively until he passed away on December 26, 1986. Ms. Gohm's efforts to obtain employment following her termination from Domtar will be discussed in more detail in the final portion of this decision.

II The Issues

This case requires the resolution of four major issues:

(i) whether a prima facie case of adverse effect discrimination on the basis of creed has been established against the Company and/or the Union;

(ii) whether the Company failed to reasonably accommodate Ms. Gohm, and whether it established that to accommodate her would be an undue hardship;

(iii) whether the Union failed to reasonably accommodate Ms. Gohm, and whether it established that to accommodate her would be an undue hardship;

(iv) if either or both respondents are found to be liable for discrimination, whether the complainant made reasonable efforts to mitigate her damages, and what remedy should be ordered.

III The Law

The complaints in this case arose pursuant to the Ontario Human Rights Code, R.S.O. 1980, c. 340. This statute has since been repealed and replaced: S.O. 1981, c. 53, as am., but as the events at issue in this case arose prior to the proclamation of that statute, the substantive provisions of the former Code apply. The complaints against the Company and the Union in this case allege discrimination in employment on the basis of creed, contrary to paragraphs 4(1)(b) and (g) of the Code, which state:

> 4(1) No person shall,
>
> (b) dismiss or refuse to employ or to continue to employ any person;
>
> (g) discriminate against any employee with regard to any term or condition of employment,
>
> because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person or employee.

It was not disputed that membership in, or adherence to the tenets of, the Seventh Day Adventist Church falls within the meaning of the term "creed" in section 4, and on the basis of **Ontario Human Rights Commission and v. Simpsons-Sears Ltd.**, [1985], 2 S.C.R. 536, 23 D.L.R.(4th) 321 (the **O'Malley** case), such an argument would appear to be untenable. I rule, for the sake of completeness, that this complaint falls within the term "creed" in section 4.

All parties agreed that the general law applicable to this case was established in the **O'Malley** case, in which the Supreme Court of Canada found that s. 4 of the Ontario Human Rights Code prohibits adverse effect discrimination and imposes on employers

a duty of reasonable accommodation short of undue hardship. This case establishes the basic principles which must guide me in the resolution of the issues of liability in this case.

(i) Prima Facie Case

The **O'Malley** decision contains an authoritative ruling on the nature of a prima facie case of adverse effect discrimination. In **O'Malley**, the complainant was a member of the Seventh Day Adventist Church, whose observance of the Sabbath prevented her from working for the respondent on her scheduled Saturday shifts. The Company ultimately terminated her employment, although she was re-hired as a part-time employee and promised any available work that did not require her to work on Saturdays. She complained to the Ontario Human Rights Commission pursuant to s. 4 of the Code, and a board of inquiry found that the Code prohibited adverse effect discrimination and imposed a duty to accommodate. However, the board dismissed the complaint because it found that the Commission had not met its onus of showing that the respondent acted unreasonably in failing to accommodate the complainant. The Commission appealed, and the Divisonal Court and Court of Appeal on a further appeal ruled that the Code did not prohibit adverse effect discrimination.

The Supreme Court of Canada ruled unanimously that the Code prohibits adverse effect discrimination. Mr. Justice McIntyre, for the Court, began his analysis of the issue by referring to

the Preamble to the Code, which enunciates its "broad policy". He described the general approach to the interpretation of human rights laws in the following passage, at pp. 328-9:

> It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in **Insurance Corp. of B.C. v. Heerspink**...), and to give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination.

This general principle has been repeated by the Supreme Court of Canada in virtually every human rights decision since 1985, so that today it must be a touchstone to guide all interpretation of these laws: see **Craton v. Winnipeg School Division No. 1**, [1985] 2 S.C.R. 150; **Action Travail des Femmes v. Canadian National Railway Co.**, [1978] 1 S.C.R. 1114; **Robichaud v. Canada**, [1987] 2 S.C.R. 84; **Ville de Brossard v. Quebec Human Rights Commission**, [1988] 2 S.C.R. 279. In the **Action Travail** case (supra.), Chief Justice Dickson described the "proper interpretive attitude towards human rights codes and acts" in this passage at p. 1134:

> Human rights legislation is intended to give rise, among other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect.

> should not search for ways and means to minimize those rights and to enfeeble their proper impact.

I accept that this generous and purposive approach to the interpretation of the Ontario Human Rights Code is appropriate, and in any event I am bound by these decisions to apply it in this case.

In **O'Malley** Justice McIntyre ruled that in order for the Code to be effective proof of an intention to discriminate should not be required. He relied on earlier decisions of boards of inquiry and courts to that effect. Similar sources were cited in this decision to support the conclusion that the Code prohibited "adverse effect discrimination", which McIntyre J. described at page 332:

> It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the workforce.

Mr. Justice McIntyre held that the complainant in the **O'Malley** case had established a prima facie case of adverse effect discrimination, in that the Saturday work requirement was a neutral rule adopted for sound business reasons and applied to all employees, which had an adverse effect on Mrs. O'Malley because of her creed. He held at p. 338 that "A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of

answer from the respondent-employer."

The O'Malley decision provides useful guidance on the issue of whether a prima facie case of adverse effect discrimination has been established in this case against the respondent Domtar, but that decision did not address the question of a Union's liability in a case such as this. On the former issue, I find that the Saturday work schedule established by the respondent Domtar for the Technical Services Department in its Red Rock mill is a neutral rule, in the sense that it does not expressly single out or refer to any individual or group defined by a prohibited ground of discrimination. I find that it was adopted for the sound business purpose of monitoring and controlling effluent emissions from the mill. I find that it had a discriminatory effect on Ms. Gohm on the basis of creed, in that it forced her to choose between compliance with the tenets of her faith and her obligations as an employee. This effect is different from the impact of this rule on others, who may dislike or resent the obligation to work on Saturday, but who do not face any religious bar to doing so. I find that ultimately this rule had the effect of leading the Company to terminate the employment of Ms. Gohm, solely on the basis of her inability to comply with the Saturday work requirement. This termination constitutes one of the "adverse effects" in relation to Ms. Gohm in the particular circumstances of this case. I find that by this action Domtar prima facie contravened paragraphs 4(1)(b) of the Ontario Human Rights Code, and furthermore I find that the establishment of

the Saturday shift requirement discriminated against Ms. Gohm with regard to her terms or conditions of employment, contrary to paragraph 4(1)(g) of the Code.

Under the law established by **O'Malley**, this finding does not, in and of itself, entitle Ms. Gohm to relief; rather, it shifts the onus to the Company to establish that it could not reasonbably accommodate her without incurring undue hardship. This issue will be discussed in the next Part of the decision, following my analysis of whether a prima facie case has been established against the Union.

Although a great deal of evidence and argument in this case was devoted to the question of the Union's actions in attempting to accommodate the needs of Ms. Gohm, its liability for a breach of the Code, if any, must spring from a breach of a substantive provision of the Code. The Union cannot, under the terms of the 1980 Code applicable here, be found liable for a failure to accommodate per se because, to borrow the phrase of counsel for the Union, there is no "free-standing duty" to accommodate. Under the **O'Malley** decision, the duty to accommodate short of undue hardship only arises after a prima facie case of adverse effect discrimination is established.

The complaint against the Union in this case alleges a breach of paragraphs 4(1)(b) and (g) of the Code. Sub-section 4(1) states "No person shall [engage in employment discrimination]..." The word "person" is defined in paragraph 26(i):

> "person" in addition to the extended meaning given it by the **Interpretation Act**, includes an employment agency, an employer's organization and a trade union.

Since the Office and Professional Employees International Union, Local 267 is clearly a trade union within the meaning of paragraph 26(j) of the Code, the Union falls within the scope of the term "person" in section 4. In this way section 4 prohibits discrimination in employment by employers and trade unions, although this could have been more directly or clearly expressed, as was done for example in section 5 of the Code.

It is evident on the facts of this case that the Union did not terminate the employment of the complainant. This may not, however, preclude a finding that a prima facie case of a violation of paragraph 4(1)(b) has been established against the Union. And there is a separate question as to whether a prima facie case of a violation of paragraph 4(1)(g), which provides that "No person shall discriminate against any employee with regard to any term or condition of employment, because of ... creed ..." has been established.

Counsel for the Commission argued that there are at least two different bases upon which to ground Union liability in this case. The Commission submitted that a prima facie case is made out if the adverse effect discrimination is authorized or required by the Collective Agreement, or alternatively if the accommodation for the complainant necessitated action inconsistent with the Collective Agreement and the union did not consent. In either case, according to the Commission, the Union

has caused or contributed to barriers to the complainant's full participation in the workplace, for which it should be found liable under the Code. The Commission argued that excusing the Union from liability because it did not actually dismiss the complainant would be to adopt an unduly technical interpretation of sub-section 4(1), and to fail to give effect to the mandate to interpret its provisions liberally.

Counsel for the Company supported the Commisson's argument on this issue, and also argued that a union could be found liable for a violation of the Code if it purposely acts or refuses to act in a manner that prevents a reasonable accommodation by an employer of the religious beliefs of an employee: **Killebrew v. Local Union 1683, A.F.S.C.M.E.**, 651 F. Supp. 95 (1986).

Counsel for the Union disputed this argument, and submitted that although the Union could be held liable in certain circumstances for a violation of sub-section 4(1), the facts of this case did not support such a finding. Counsel for the Union argued that this issue had to be approached with an awareness of the reality of the balance of power in Ontario labour relations law, a reality which, in her submission, greatly restricts the scope of potential union liability under section 4 of the Code. The Union argued that it derives its powers and responsibilities from the Ontario Labour Relations Act, powers essentially to require the company to negotiate a collective agreement in good faith, to strike if collective bargaining is not successful, and the right to administer and enforce the collective agreement.

During the life of a collective agreement the Union's powers flow from that agreement. In the submission of the Union, it derives no additional grant of power from the Ontario Human Rights Code, and therefore if it is to be found to be in breach of the Code that must be done in connection with some action or event or thing over which the Union had power to control or influence. The essence of the Union's argument is that it cannot be found responsible for a breach of section 4 of the Code unless it in some way committed, or at least directly contributed to the discriminatory act. The Union should not be found responsible for the exercise of residual management rights, simply because it was a party to the collective agreement that applied to the employment context in which management exercised these rights.

There are few Canadian human rights authorities to guide me on this issue. As I mentioned earlier, the **O'Malley** case did not involve a union, and so the rules it establishes are directed to the rights and duties of the employer, although by extension they may apply to a Union as well. In **Roosma and Weller v. Ford Motor Company** (1988), 9 C.H.R.R. D/4743; aff'd (1988), 66 O.R. (2d) 18 (Div. Ct.) a Union argued on a preliminary motion that a trade union could not properly be found to have violated sections 4 and 8 of the 1981 Ontario Human Rights Code. The Board of Inquiry rejected this argument, and concluded that section 8, which was the relevant provision on this issue, could apply to a trade union for the reasons expressed at p. D/4748:

> There are two features of section 8 which indicate that a trade union may properly be joined as a respondent. The first is that "person" is defined, as counsel noted, to include a trade union under section 45(c) of the Code. The second is that an infringement may arise "directly or indirectly". Thus, while issues involving the right to equal treatment with respect to employment might usually be expected to arise "directly" between the employee and the employer, section 8 clearly contemplates them arising at least "indirectly" between employees and other persons, including trade unions.

Although counsel for the Union argued that this case was merely authority for the proposition that a union may properly be named as a respondent, it appears to me that the passage cited above indicates a relevant consideration in the circumstances of this case, namely that employment discrimination can arise "indirectly" by virtue of the action of a union.

In **Renaud v. School District No. 23 (Central Okanagan)** (1987), 8 C.H.R.R. D/ 4255 (B.C.), the Board ruled that the union should be held responsible for adverse effect discrimination and for its failure to accommodate the complainant. The complainant in this case, a member of the Seventh Day Adventist Church, was terminated from his employment as a school custodian because of his inability to comply with the shift work requirements for his position. The shift schedule was set out in the collective agreement, and the union refused to allow an alteration of the schedule to accommodate the complainant. In these circumstances the Board ruled that the complaint form should be amended to include section 9 of the B.C. Act (the equivalent to section 4 of the Ontario Code) because, at p. D/4259:

> Since the union is equally responsible with the school board for the terms and conditions of the collective

> agreement (which contains the discriminatory requirement), it would be unjust to so limit the complainant's relief and to order only the school board to bear all the consequences of the
> discriminatory requirement according to section 17 of the Act... It would be a travesty of justice to order only one of two persons contravening the Act to cease doing so by reason of a possible deficiency in the form of the complaint as opposed to its substance.

The Board ordered that the complaint be amended to include section 9 of the Act, and ruled that since the collective agreement dictated the complainant's terms of employment which included the discriminatory term, and since the union was a party to the collective agreement, it was liable for the violation of the Act.

In this case the Board found that the principles stated in the **O'Malley** decision applied to all persons who contravene a human rights statute, including unions (at page D/4262):

> To limit the principles set forth in **O'Malley**, supra., to employers would deny any relief for complainants under provisions dealing with employment situations other than the employee-employer relationship and in my view would unfairly set different standards for non-emplyers who have unlawfully discriminated against a person.

This decision has been overturned on appeal, but neither the Supreme Court nor the Court of Appeal addressed this aspect of the decision: (1987), 9 C.H.R.R. D/ 4609 (B.C.S.C.); (1989), 11 C.H.R.R. D/ 62 (C.A.).

Counsel also cited other cases from Canada and the United States which deal with the question of union liability for breach of a human rights statute, including **Mossop v. Department of Secretary of State** (1989), 89 CLLC 16,041 (Fed.); **E.E.O.C. V. University of Detroit**, 701 Fed. Supp. 1326 (1988); **Tooley v.**

Martin Marietta, 648 F. 2d 1239 (1981); and **Anderson v. General Dynamics**, 589 F. 2d 397 (1978).

Counsel for the Union correctly pointed out that the Canadian authorities cited here involved adverse effect discrimination arising from the very terms of the collective agreement, but in my view they establish relevant principles to guide my decision in this case, and in particular these decisions indicate that I should pay heed to the purpose of the Code, which, as was emphasized in **O'Malley** and **Robichaud**, supra., is to remove and prevent discrimination. Based on these decisions it is appropriate to seek to establish principles of union liability under section 4 of the Code which are consistent with the promotion of this purpose.

As this is a somewhat novel issue in Canadian human rights law, it is neither wise nor appropriate for me to attempt to make a blanket ruling on the question of union liability. On the facts of this case Union liability for adverse effect discrimination could arise either directly from the terms of the collective agreement which the Union negotiated and ratified, or indirectly, from its participation in the establishment or continuation of the discriminatory term or condition of employment which contributed to the termination of the complainant. In this regard it should be recalled that the **O'Malley** decision was based on the very provision of the Code at issue in this case, section 4, and there the Supreme Court distinguished between "direct" discrimination and "adverse effect" or indirect discrimination.

From this I hold that a union may be liable for a breach of section 4 of the Code on the basis that it directly committed, or indirectly contributed to, the adverse effect discrimination arising from the employment rule or situation. I am fortified in this conclusion by the fact that boards of inquiry have long held that the discriminatory consideration need only be one of the factors that motivated the decision, and not the sole factor in the decision: see **R. v. Bushnell Communications** (1974), 1 O.R. (2d) 442 (H.C.J.); B. Vitzkelety, **Proving Discrimination in Canada** (1987), pp. 79-83. Similarly I find that a union may be held accountable even if its actions merely were one factor or element in the creation, maintenance or application of the rule or practice which has a discriminatory adverse effect.

In approaching this issue, it should be recalled that the Union was intimately involved in the discussions about the complainant's situation during the period in question. It engaged in repeated discussions with the complainant and representatives of the respondent Domtar. The Union was not a mere bystander in this sequence of events, it was an active participant. The adverse effect discrimination in this case is the Saturday work schedule imposed on employees in the Technical Services Department. That schedule is referred to in article 9.05 of the Collective Agreement (Exhibit 9):

> 9.05 At present, a work schedule is maintained in the Technical Services Department to sevice Saturday work requirements. Departmental discussions will be held if a change in this or other departments is necessary.

Can this reference establish a prima facie case of discrimina-

against the Union?

Counsel for the Commission argues that this article establishes that the discriminatory rule is clearly rooted in the Collective Agreement, and that this clause specifically authorized the Company to assign the complainant to Saturday work. The Commission conceded that the Union was correct in its argument that this clause did not **require** the Company to assign the complainant to the Saturday shift, but he argued that this was not necessary to establish liability. In his submission, as long as the discriminatory rule is authorized or mandated by the collective agreement, the Union is liable. The Commission argues that article 9 must be read as a whole and it establishes various rules regarding hours of work, including the general work schedule described in article 9.02, (Monday to Friday) and the exception to that described in article 9.05, i.e. the Saturday work schedule for employees in the Technical Services Department. Having negotiated this package of terms in regard to hours of work and rates of pay, the Commission argues, it does not lie with the Union now to seek to escape responsibility for the application to Ms. Gohm of the work schedule clearly contemplated in a specific article of the Agreement.

Counsel for the Commission argued in the alternative that since the Union possessed the power to agree to an exemption or modification of the Collective Agreement, it could be found liable for refusing to agree to such modifications if that was the only way the complainant could be accommodated.

Counsel for the Union submitted that clause 9.05 did not require the Company to schedule Ms. Gohm to work. Rather, the Company did so in exercise of its residual management rights under article 6.01 of the Collective Agreement, and for this the Union cannot be held liable. The Union also argued that it should not be liable simply for negotiating a collective agreement which failed to prevent a discriminatory exercise of residual management rights. Finally, the Union argued that it should not be held liable for failing to accede to a modification of the collective agreement when such a modification was not required in order for the Company to accommodate the complainant, or for failing to adequately represent the interests of the complainant in pursuing an accommodation.

I have ruled that the adverse effect discrimination in this case arose by virtue of the Saturday work schedule imposed on employees in the Technical Services Department. In my view, the Union's involvement in the maintenance, if not the creation, of this rule through its negotiation of article 9.05 of the Collective Agreement contributed directly to the imposition of discriminatory terms or conditions of employment on Ms. Gohm, and thus constituted a prima facie violation of paragraph 4(1)(g) of the Code. It is not necessary for me to rule whether a prima facie violation of paragraph 4(1)(b) has been established on these facts, and I will refrain from addressing this issue.

The Union participated in the negotiation of article 9.05, and in so doing it recognized an exception to the normal work

schedule prescribed in articles 9.01, 9.02 and 9.03. Article 9.05 expressly stipulates that this schedule is "maintained", and that "Departmental discussions will be held if a change in this or other departments is necessary." According to the testimony of Mr. Eamer, he interpreted this clause to require departmental agreement prior to a change in the schedule. Miss McCabe testified that the Union had attempted in the course of negotiations with the Company to amend this clause in regard to the rate of pay for Saturday work.

The terms of article 9, when read as a whole, indicate that the Union agreed to the maintenance of the Saturday work schedule for the Technical Services Department, as an exception to the normal work schedule. It also provides for discussions to be held prior to a change in the schedule, and this reflects the Union's concern about any changes to this schedule.

If I am wrong in this assessment of Union liability, there is an alternative basis for finding a violation of paragraph 4(1)(g) of the Code. During the course of the discussions concerning Ms. Gohm's situation, the Union indicated to her and to Mr. Eamer and other Company supervisors its intention to enforce the terms of the collective agreement, and in particular the clauses regarding the rate of overtime pay. This directly contributed to the termination of Ms. Gohm by the Company, and though it was not an act of intentional discrimination against the complainant, the enforcement or application of these provisions in her situtation had an adverse effect upon her by

virtue of the other clauses in the Collective Agreement. The failure of the Union to attempt to exempt her from, or otherwise modify, these clauses imposed on Ms. Gohm a penalty not imposed on other employees, in that it placed her in a situation where a reasonable accommodation was impeded because of the intersection of the clauses regarding overtime and work schedules. Although the overtime provisions are neutral rules of general application which have been adopted for sound business purposes, their application to Ms. Gohm's situation in conjunction with the Saturday work schedule created a discriminatory effect on the basis of her creed.

The approach to Union liability which I have adopted is consistent with the argument of the Union, which I accept, that the Human Rights Code should be interpreted so as to take account of the realities of the distribution of power under the scheme of labour relations in this province. That distribution of power recognizes residual management rights, but it also recognizes the power of a Union to negotiate the terms of a collective agreement, and to refuse to consent to terms which it finds unacceptable (save for the provisions prescribed in the Labour Relations Act). This law also recognizes the right of a Union to agree to modifications of a collective agreement during the term of the agreement.

The approach to Union liability adopted here is also consistent with my understanding of the purpose of the Code, which is to seek to prevent and remove discrimination by

attaching liability to those who, by virtue of their authority, are in a position to address the problem: see **Robichaud**, supra. In the context of a unionized workplace, the union may have authority to prevent or remove causes of discrimination in employment, and as has been noted in the cases cited earlier, it would be anomalous to interpret the Code restrictively so as to immunize the union from liability, or to minimize its liability, when the law directs that the opposite approach be adopted in relation to employer liability. As well, an overly restrictive approach may prevent a board of inquiry from reaching many discriminatory practices which are created or maintained with the assistance or acquiescence of the Union. This would not be consistent with the purposes of the Code, nor with the guidelines established by the Supreme Court for the interpretation of human rights laws.

In the case at bar, I find that the Collective Agreement does address the issue of Saturday work in article 9.05. This was done with the consent of the Union, which also restricted the ability of the complainant to continue her employment by its attempts to enforce the other terms of the Collective Agreement, and its failure to agree to exempt her from, or otherwise modify these terms. On the basis of these findings I rule that a prima facie case of adverse effect discrimination contrary to paragraph 4(1)(g) of the Ontario Human Rights Code has been established.

(ii) Reasonable Accommodation by the Company

On the basis of the **O'Malley** decision, my earlier ruling that a prima facie case of adverse effect discrimination had been established against the Company did not automatically entitle the complainant to relief. Instead, it shifted the burden to the Company to establish that it could not reasonably accommodate the complainant without incurring an undue hardship. Although the concept of reasonable accommodation short of undue harship originated in American law, it was incorporated into Ontario human rights law by the **O'Malley** decision, and it must be understood and applied as it was set out in that judgment. I will first discuss the interpretation of this standard in Canadian human rights law before examining its application to the Company.

In **O'Malley**, McIntyre J. distinguished between the situation where direct discrimination is established, in which case the working rule is simply struck down if it does not meet the statutory justification test (as in **Ontario Human Rights Commission v.Borough of Etobicoke**, [1982] 1 S.C.R. 202) and the situation that arises in a case of adverse effect discrimination on the basis of creed "resulting from the effect of a condition or rule rationally related to the performance of the job and not on its face discriminatory." (p. 333) In the latter situation, according to McIntyre J., the effect of the working rule on the complainant must be considered,

> and if the purpose of the Ontario Human Rights Code is to be given effect some accommodation must be required from the employer for the benefit of the complainant. The Code must be construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the

lawful conduct of his business.

The purpose of the doctrine of reasonable accommodation, according to this decision, is to establish a realistic limit on the scope of a person's exercise of religious freedom, a limit which is consistent with the importance of freedom of religion in Canada and the interests of the employer, other employees and the general public (see p. 334).

The duty is formulated by McIntyre J. in the following terms, at p. 335:

> In this case, consistent with the provisions and intent of the Ontario Human Rights Code, the employee's right requires reasonable steps towards accommodation by the employer.
>
> Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue harship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.

In a subsequent passage McIntyre J. indicated that there is a complementary obligation on the complainant in these circumstances (p. 335):

> The employer must take reasonable steps towards that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

This onus on the complainant was discussed in **Re Central Alberta Dairy Pool and Alberta Human Rights Commission** (1986), 29 D.L.R. (4th) 154 (Q.B.).

The final ruling which is relevant here concerns the burden of proof. In **O'Malley**, Mr. Justice McIntyre ruled at page 338 that once a prima facie case of adverse effect discrimination is established by the Commission or complainant, the onus shifts to the respondent, because "it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence." This onus will not always be a heavy one, but it will normally require "the employer to show undue hardship if required to take more steps for its accommodation than he has done."

The application of these principles to the case at bar is not without difficulty, in large measure because the questions at issue here were not dealt with in depth by the Supreme Court in **O'Malley**. The essential question is: what is meant in law by the concept of "reasonable accommodation" and its companion standard "undue hardship"? It is clear that an accommodation which imposes an "undue harship" is not "reasonable", but that reasoning is circular and not particularly helpful. In the **O'Malley** decision McIntyre J. offers guidance on the point, but no fixed rules. In a brief discussion of undue harship he refers to the factors of "undue interference in the operation of the employer's business" and "undue expense". In an earlier passage he also refers to "reasonable steps towards an accommodation by the employer."

The interpretation of the concept of reasonable

accommodation short of undue harship that I adopt here reflects the interpretive guidelines established by the Supreme Court of Canada in the cases cited earlier. In particular, I am guided by the cases which emphasize that the purposive approach entails two corollary principles: first, the principle that the substantive prohibitions of discrimination in these laws must receive a broad and generous interpretation, and second the principle that exceptions or defences in these laws must be narrowly construed, so as not to defeat the purpose of the statutes: see **Borough of Etobicoke**, supra., and **Ville de Brossard**, supra..

I find that the duty to accommodate short of undue harship imposes a duty on employers (and, as will be discussed later, trade unions) to take substantial or meaningful steps to accommodate the requirements of the complainant. This duty defies generalization, because each case will involve unique circumstances, but as a general matter I find that the law requires more than a **de minimus** effort or expenditure on the part of the respondent. As counsel for the Commission pointed out, the very term "undue" hardship itself indicates that there is some hardship which is "due", and it is only hardship which goes beyond this minimum that can be relied upon by a respondent as a defence. It would be inconsistent with the purpose of human rights laws to prohibit adverse effect discrimination and at the same time to interpret the defence of reasonable accommodation short of undue harship in such a manner that virtually any desultory effort to meet the complainant's needs, or any minimal

expense, would be sufficient to justify the challenged rule or practice.

The **de minimus** rule was urged upon me by counsel for the Company, on the basis that the Supreme Court in **O'Malley** incorporated the concepts of reasonable accommodation and undue hardship from American law, and in doing so it adopted this standard, as enunciated in the leading case of **Trans World Airlines v. Hardison**, 97 S. Ct. 2264 (1977). Counsel for the Commission argued that the **Hardison** standard is inconsistent with the general approach to Canadian human rights law, and that it was decided on the basis of a statute and in the context of a Constitution which has no parallel in Canada.

A close examination of the **O'Malley** decision indicates that while McIntyre J. referred to American authorities on the issues of adverse effect discrimination and reasonable accommodation short of undue harship he did not specifically adopt them, and indeed he equally referred to Canadian authorities on these issues. Thus, while it is true that Justice McIntyre referred to **Trans World Airlines v. Hardison** at p. 333 of this decision, he did not discuss it in detail, nor did he specifically adopt its standard. In my view, this reference is equivocal, and the matter must be approached from a reading of the decision as a whole. At each stage of the analysis in this decision McIntyre J. was careful to point out that while these concepts may have originated in the United States, they have been incorporated into Canadian law by previous board of inquiry and court decis

(see pp. 329-30; and 332). The standards of reasonable accommodation and undue harship set out in these Canadian decisions, I would suggest, are as relevant if not more so than that which is contained in American law.

As well, the Supreme Court has adopted a uniquely Canadian approach to the interpretation of human rights laws in the line of cases I referred to earlier. In recent decisions the Court has indicated that American authorities are not to be taken as binding, or to be incorporated into Canadian law without reference to the unique - almost constitutional - nature of Canadian human rights law: see **Brooks v. Canada Safeway Ltd.** (1989), 10 C.H.R.R. D/6183; **Janzen v. Platy Enterprises** (1989), 10 C.H.R.R. D/6205. In particular, in **Brooks**, Dickson C.J.C. rejected American authorities on the point in issue, because (p. D/6197): "In my view, the reasoning in those two cases does not fit well within the Canadian approach to issues of discrimination."

A close examination of the majority decision in **Hardison**, in my view, leads to the conclusion that it cannot be directly applied to Canadian human rights law. In **Hardison**, the Court held that TWA had made reasonable efforts to accommodate the plaintiff, in that it had attempted to meet his needs without breaching the seniority system set out in the collective agreement and without incurring extra expense. The Court ruled that since the relevant law included a specific provision which accorded bona fide seniority provisions a special protection (s.

703(h) of Title VII), TWA could not reasonably be required to exempt Hardison from the seniority system, or the shift preferences that resulted from it. The Court also held that to accord such special treatment to Hardison would amount to unequal treatment of other employees on the basis of religion, by denying them their shift preferences in order to accommodate his religious needs. Finally, the Court ruled at p. 2277 that to "require TWA to bear more than a de minimus cost in order to give Hardison Saturdays off is an undue harship."

The essence of the majority's reasoning is encapsulated in the following passage (p. 2277): "In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."

In my view the **Hardison** decision can be distinguished on the basis that it relates to a statutory scheme which is significantly different than the Ontario Human Rights Code, and it does not fit well with the Canadian approach to issues of discrimination. In particular, the Code contains no parallel to the exemption in respect of bona fide seniority systems in Title VII, and indeed under Canadian law a collective agreement provides no defence to an allegation of discrimination: see **Borough of Etobicoke**, supra. As well, Canadian law is not restricted by the doctrine of separation of Church and State which prevails in the United States, and which may have

influenced the majority's approach to this issue in that to adopt a stronger standard of undue harship may have amounted to favouring one religion over another: see the dissent by Marshall J., at pp. 2279-80.

Finally, it is my view that **Hardison** proceeds upon the basis of an unduly restrictive notion of discrimination, which finds no support in current Canadian law. Indeed, the Supreme Court of Canada has stated that sometimes equality will require different treatment to accommodate special needs: **R. v. Big M Drug Mart**, [1985] 1 S.C.R. 295, and furthermore it has sanctioned a purposive approach to discrimination which seeks to interpret human rights law so as to eliminate discrimination and to provide relief for the victims of discrimination: **O'Malley**. These considerations lead me to conclude that the **Hardison** standard of undue harship, that is the de minimus standard, should not be adopted for the purposes of this decision.

In applying the test for reasonable accommodation short of undue hardhsip I stated earlier to the actions of the Company in the case at bar, I will examine its attempts to arrange for an accomodation of the complainant based on the options that were then under discussion among the parties. It is not necessary for me to address the interesting question of whether accommodations which were not considered when the events occurred can be relevant to this determination. Although counsel for the Commission suggested several alternative accommodations (some of which were quite imaginative) and explored these at length in the

evidence, I will leave that issue aside because on the basis of my conclusions in relation to the accommodations that were actually discussed, it is not necessary for the resolution of this case to examine these alternatives.

When the complainant presented her problem with the Saturday shift requirement to the Company, she suggested that she would be willing to work her scheduled weekend work on Sunday instead of Saturday. Ms. Gohm also testified that she indicated throughout this period that she was willing to accept any compromise or arrangement that would permit her to keep her job. Shortly before her termination she approached her supervisor to ask whether she could arrange for another employee to work her shift scheduled for October 10, as was done by employees in other areas of the mill.

The evidence indicates that these were the main options under consideration by the Company at this time, and the evidence supports the conclusion that the preferred option for the Company was that Ms. Gohm be allowed to work on Sunday at straight time. However, the evidence of Mr. Eamer does not support the conclusion that he actually firmly offered to arrange or permit this, or specifically promised that this would be proposed on behalf of Ms. Gohm. Throughout his testimony, and indeed even in his written notes prepared at the time, he simply indicated that the Company would be prepared to "discuss" or "consider" this option, or that the Company "would not object" to it if the Union would agree. Counsel for the Company argued that Mr. Eamer chose

these words carefully, not to indicate a reluctance to agree to this arrangement for the complainant, but rather so as to avoid a dispute with the Union about whether he was bargaining directly with an individual employee. He argues that this choice of words was simply a reflection of the Company's concern to avoid re-kindling the dispute with the Union on the subject of such negotiations. The evidence is consistent with this conclusion, but it also points to another explanation that is equally compelling, that is the Company's concern about setting a precedent. This concern was referred to repeatedly in the testimony of all the parties to these discussions, and it is referred to in the memorandum from Mr. Gichard to Mr. Seagris which summarizes the situation (Exhibit 123). I find that it equally likely that this too may have prompted the Company to hold back from making a specific undertaking to the complainant.

In any event, the preferred accommodation for the Company was for the complainant to work on Sunday at straight time. According to the evidence of Mr. Eamer, this would have imposed the fewest burdens on the Company, and it was consistent with its operational requirements. He testified that he felt it was unfair to the other employees to pay Ms. Gohm at the overtime rate for doing the same work as they did, and for which they recieved straight time.

I find that this concern about the interests and views of other employees is a relevant consideration to the determination of whether the accommodation would constitute an undue harsh-

and can be properly taken into account on the basis of the **O'Malley** decision. It is one relevant factor in the determination of whether the accommodation would cause "undue interference in the operation of the employer's business." For example, if the employer can prove that the requested accommodation caused, or could reasonably be expected to cause, great discontent among the other workers, that would be relevant. However, as in other areas of human rights law, care must be taken to ensure that this discontent is not the result of discriminatory or uninformed attitudes on the part of these employees, for to give effect to such attitudes would undermine the purposes of the Code: see e.g. **Manitoba Food and Commercial Workers Union v. Canada Safeway Ltd.** (1983), 4 C.H.R.R. D/1495; **Stanley et al. v. R.C.M.P.** (1987), 8 C.H.R.R. D/3799. In this case I would find that the interests of other employees do not reflect discriminatory attitudes, but rather would give effect to the normal expectation that employees doing the same work should receive similar pay.

The Company refused to pay the complainant the rate of pay prescribed by overtime not solely on the basis of possible objections of other employees however. It also took the position that it would accommodate the complainant so long as doing so did not cost the Company any money. To quote from Mr. Eamer's testimony (February 21, p. 109):

> Q. And were you prepared to pay Irene Gohm time and one half to work on Sundays?
>
> A. No I was not.
>
> Q. And why not?

> A. I guess primarily for two reasons. I was willing to make an accommodation, but not an accommodation that would cost the company money. I was concerned from the specific financial implications of such an agreement as well as the, Mr. Seagris' concern of the possibility of a precedence (sic) setting move that could make the financial penalty grow to be much greater.

The Company argued, on the basis of **Hardison**, that to require it to incur any cost in order to accommodate the complainant would constitute an undue hardship.

I should be state here that all parties agreed that based on the rate of pay Ms. Gohm received as a Junior Laboratory Technician, and in view of the fact that she would have normally been scheduled to work eight (8) Saturday shifts of four hours each during the year, the extra expense of paying the complainant the overtime rate would have amounted to only $160.00 per year. It was also established that during the year 1981, Domtar Inc. registered net corporate earnings of $65,556,000.00. Miss McCabe testified that the Company regularly spent "thousands", if not "thousands upon thousands" on overtime for employees working in other areas of the mill.

There is also evidence that when Ms. Gohm requested to be permitted to arrange for another employee to work her Saturday shift scheduled for October 10 so that she could maintain her employment, this was refused by Mr. Gichard. The evidence is clear that the Company and the Union knew of, and consented to, other similar arrangements on a regular basis among employees. Thus her proposal was neither novel nor inappropriate, but the Company did not suggest it to Ms. Gohm, or attempt to assist her

to arrange it, at any time. When she finally requested an opportunity to swap shifts with a co-worker, the Company refused. It had already reached the decision to terminate her employment.

This review of the evidence leads me to find that the Company did not establish that it made reasonable efforts to accommodate the complainant in respect of the options that were then under discussion. It did not specifically offer to allow her to work on Sunday at straight time, nor did it specifically promise to take the matter up with the Union. Instead, the Company told Ms. Gohm that it was prepared to consider this accommodation, but only if the Union consented. In the circumstances of this case, where the Company was of the opinion that its preferred solution to the problem would contravene the Collective Agreement and would require the consent of the Union, I find that it was incumbent on the Company to at least discuss the matter with the Union, and to specifically offer to agree to the necessary changes. This was done, according to the evidence of Mr. Eamer, only once, and even then in an equivocal way, when he told Miss McCabe that the Company was prepared to consider it if the Union would agree (Trancript, February 21, p. 110, Exhibit 130).

My reading of the evidence in this case convinces me that the Company did not take appropriate action to fulfill its legal duty to attempt to reasonably accommodate the complainant. It suggested to the Complainant that the Union's consent would be required, but it did not specifically offer to take the matter

up with the Union, nor did it actually offer to agree to the necessary changes to the collective agreement in its dicussions with the Union. This may have been because the Company was of the view that the Union would seek other changes to the Collective Agreement in return for an amendment to permit Ms. Gohm to work Sundays at straight time, but that in itself is no excuse for failing to make the specific offer.

A review of the testimony of the three principals in this case reveals that the Company and the Union both proceeded on the basis of assumptions about the position of the other: the Company had formed the opinion that the Union was seeking other concessions, and the Union was convinced that the Company had decided that it would not open the Collective Agreement under any circumstances. Each now testifies that the other was mistaken, but what is striking is the extent to which these assumptions appear to have impeded meaningful discussions between the Company and the Union on the individual circumstances of Ms. Gohm's situation. Perhaps this is not unusual in a collective bargaining situation, where the past history of disputes between the parties can have a long-lasting effect on their relationship. However that may be, I find that the Company had an obligation under the Ontario Human Rights Code to make serious efforts to reasonably accommodate the complainant, and that this duty entailed more than merely indicating that it would be prepared to consider or discuss a reasonable accommodation if the Union would consent to it. The failure of the Company specifically to offer to permit

this change, or to promise to make its best efforts to secure it, is sufficient in my view to find that it failed to reaonably accommodate the complainant.

It is also appopriate to examine the Company's other options to accommodate the complainant. If I am wrong in my previous finding, it is necessary to examine all of the options available to the Company to reasonably accommodate Ms. Gohm. The other options were to pay her the overtime rate of time and one-half for the Sunday shift, or to permit her to arrange for someone else to work in her place on October 10. I find that in the circumstances of this case it would not be an undue harship on Domtar to pay Ms. Gohm the overtime rate for Sunday work, a rate it should be recalled which would entail at most $160.00 extra per year in salary expenses to the Company. Although this may have escalated slightly over time, as her wages increased, and although it may have caused some discontent among the other laboratory technicians, neither of these factors would be sufficient to create an undue harship in this case. And although the Company cited its concerns about establishing a precedent which could lead others to advance similar claims, there is no evidence that would objectively support such a finding as a basis for undue harship in this case. In this respect this case can be distinguished from American authorities, and **Osborne v. Inco Ltd.**, [1985] 2 W.W.R. 577, 6 C.H.R.R. D/2591 (Man.C.A.), where the total cost to an employer of accommodating all of the demands of its empl ees has been taken into account. I find that the

must be some objective evidence, based either on actual experience or real evidence that other claims are likely to be made by employees, before this concern can be the basis for finding undue hardship.

On the issue of the shift swap, I find that the Company has not established any harship or burden that would accompany this action, at least as a temporary expedient until a better solution could be arranged. Obviously Ms. Gohm could not have actually worked another Saturday shift for the employee who worked in her place. She could, however, have worked on the holidays provided for in the Collective Agreement. In these circumstances allowing her to trade shifts with another employee was tantamount to going to a five-person rotation for the weekend work schedule. As was pointed out by counsel for the Commission, the Company did consent to operate on a five-person rotation during the summer of 1981, when it acceded to Ms. Gohm's request to delay her commencement date. Mr. Eamer testified that there were operational concerns which militated against operating on such a rotation on a permanent basis, but the evidence establishes that the Company was able to do so even during the summer months, when the staffing problem was aggravated by the need to cover for employees on vacation. In these circumstances I find that the Company could have reasonably accommodated the complainant, at least as an interim measure, by allowing her to arrange for others to work her scheduled shifts. This would have entailed no cost to the Company, and on the basis of the evidence I find that

it would have created few operational difficulties, especially if it was a temporary measure.

For the foregoing reasons I find that the respondent Domtar Inc. is liable for a breach of paragraphs 4(1)(b) and (g) of the Ontario Human Rights Code, in that it imposed a rule upon Ms. Gohm which had an adverse effect on the basis of her creed, and it failed to reasonably accommodate her short of undue harship.

(iii) Reasonable Accommodation by the Union

It is not necessary for me to repeat the analysis of the law pertaining to reasonable accommodation short of undue harship, nor is it necessary to engage in an extensive review of the facts discussed in the previous parts. Like the Company, I find that the Union did not fulfill its responsibility to reasonably accommodate the complainant because it did not specifically offer to negotiate with the Company in regard to the changes in the Collective Agreement which it said were required, nor did it ever specifically offer to agree to these changes in its communications with the complainant or the Company. I should add that I realize that neither the Company nor the Union could unilaterally modify the Collective Agreement, and so their actions here must be judged according to what action they actually took, what they said or promised to the complainant, and what they discussed as between themselves. On this basis, and based on the findings on the evidence I have made above, I find

that the Union did not reasonably accommodate the complainant.

Unlike the Company, in my view this is the only basis on the evidence for finding the Union responsible for failing to accommodate the complainant. The Union pressed the Company to accommodate Ms. Gohm's needs by paying her at the overtime rate of pay for Sunday work. The evidence of Miss McCabe, which I am prepared to accept, indicates that on October 9 she urged Mr. Gichard to exempt Ms. Gohm from the Saturday work requirement, at least as a temporary measure, and this suggestion was repeated when Miss McCabe met with Mr. Seagris on October 27 (Exhibit 18). In these respects, I find that the actions of the Union were consistent with its obligation to reasonably accommodate the complainant.

The undue hardship standard as it is described in O'Malley and similar cases does not directly apply to the situation of a Union. Although conceivably an accommodation could impose costs on the Union, it will in most cases be a question of the extent to which the Union undertook reasonable efforts to attempt to reach a compromise or agreement to accommodate the individual's needs, and in this sense the standard of "operational inconvenience" is relevant. It would not be reasonable to expect a Union to go so far as to engage in a strike in order to obtain agreement from the Company to an accommodation, but neither is it unreasonable to expect the Union to expend substantial and serious efforts to reach an agreement on the matter. In this case, I find that the Union did not expend such efforts in

relation to the question of amending the Collective Agreement to permit Ms. Gohm to work on Sunday at straight time. The Union's perception that the Company was completely unwilling to re-open the Collective Agreement under any circumstances may have proven accurate, but the fact remains that it never put the question directly to the Company in relation to Ms. Gohm's situation, and separate and apart from all other considerations. Ms. Gohm made such a request of the Union, but I find that the Union did not do so, and on this basis I find that in these circumstances the Union did not reasonably accommodate the complainant.

This failure is particularly difficult to fathom in view of the evidence of Mr. Eamer, which is confirmed by his notes, that when he spoke with Miss McCabe on October 6th, he indicated that the Company was prepared to consider the option of allowing Ms. Gohm to work on Sunday at straight time (Exhibit 130). This was a clear opportunity for the Union to put a specific proposal to the Company to amend the Collective Agreement to permit this, but the evidence shows that this proposition was never advanced by Miss McCabe. Despite her efforts to arrange another accommodation of the complainant on October 9, which indicates that she was sincere in her feeling that Ms. Gohm had been wronged by the Company, I find that the actions of Miss McCabe for the Union with regard to the amendment of the Collective Agreement were not adequate to meet the onus on the Union to reasonably accommodate the complainant short of undue hardship.

I therefore find that the Union has violated paragraph

4(1)(g) of the Ontario Human Rights Code.

IV Remedy

I have found both the Company and the Union to have contravened the Ontario Human Rights Code, and it remains for me to determine the appropriate remedy. The Code provides broad remedial authority to Boards of Inquiry, and in this respect the "old" and the "new" Codes are similar. Counsel for the complainant and the Commission urged me to make a variety of remedial orders, including:

- damages for loss of income from October 9, 1981 until March 23, 1987;
- an order that the Respondents comply with the Code in the future;
- an order that the Respondents post copies of the Code in conspicuous places at all operations in Ontario;
- an order directing that an education program be carried out with the assistance of the Commission at the Human Resources Department at Domtar's Red Rock operation; and
- various other orders, directing the Respondents to identify job rules or collective agreements which impose Friday night and/or Saturday work requirements, and measures taken or available to accommodate the needs of Saturday Sabbatarians.

Counsel for the Company argued that the Complainant had failed to mitigate her damages adequately, and therefore her claim for lost wages should be reduced accordingly, and further that she was specifically offered a reasonable accommodation by the Company in March of 1982, and her refusal to accept it terminated her entitlement to damages under the Code. The Company also argued that Commission's delay in proceeding with this case should restrict any damage award for lost wages. Finally, the Company submitted that the systemic remedies sought by the Commission were inapproriate in the circumstances of this case, in view of the delay in proceeding with the case and the change in the law in the intervening period.

Counsel for the Union supported the argument of the Company that liability for lost wages should be restriced due to the delay in processing these complaints. The Union also argued that its liablity in respect of lost wages should terminate at the point when the Commission decided not to engage in conciliation with the Union, because it was thereby deprived of an opportunity to limit its liability. In the alternative the Union argued that it should not be liable in any way for lost wages, because it did not make the decision to terminate the complainant.

With respect to the claim for lost wages, I find that the law has established as a general principle that human rights remedies are intended as full and complete compensation of the complainant's losses and harm suffered, and that liability under the Code is a unique form of statutory liability which is not

governed by principles estalished in other areas of the law: Re **Airport Taxicab Association and Piazza** (Ont. C.A., 1989); **Robichaud**, supra. Principles and concepts adopted in other areas of the law may be relevant as guidelines, but are not binding on a Board of Inquiry.

The purpose of a damage award under the Code is to put the complainant, so far as money can do so, in the position she would have been in had her human rights not been violated. An award of damages under the Code must reflect the social importance of the right which has been violated, and should not be so low as to create a licence to discriminate. However, a complainant is under a duty to mitigate her damages, for example by making reasonable efforts to obtain other suitable employment: **Torres v. Royalty Kitchenware Ltd.** (1982), 3 C.H.R.R. D/858; **Airport Taxicab Association v. Piazza**, supra..

The **Torres** case also establishes the principle, which I adopt notwithstanding the agument of counsel for the complainant that it should not be followed, that damages for lost wages where attempts by the complainant have been unsuccessful should be cut-off at the point where those damages were no longer reasonably forseeable to the wrongdoer. The Board stated, at D/872:

> I would express this as saying that a respondent is only liable for general damages for a reasonable period of time, a "reasonable" period of time being one that could be said to be reasonably forseeable in the circumstances by a reasonable person if he had directed his mind to it. That is, what is the duration of time in which mitigation could reasonably be expected to have been achieved even though it could not be in the particular situation given the unique, exceptional situation of the aggrieved complainant.

The facts of this case are that the complainant commenced work on August 9, 1981 and was terminated from employment on October 9, 1981. This termination was admitted to be solely based upon the inability of the complainant to fulfill the Saturday work requirement. In these circumstances I would hold that the Company and the Union must share liability for this loss. The Company terminated Ms. Gohm, but the Union and the Company established and maintained the discriminatory work rule which caused this termination. The Union, in my view, was directly involved in actions which precipitated the termination, by its creation and failure to take adequate action to modify, the Saturday work rule and the overtime clauses in the Collective Agreement.

The complainant was paid at a rate of $353.70 per week, and her salary would have increased over time in accordance with the collective agreement. I find that her loss of wages was a forseeable and direct consequence of the discriminatory conduct of the respondents, for which she is entitled to compensation under the Code.

The key question, however, is the measure of compensation, and to determine this it is necessary to examine her efforts to mitigate her damages, and to apply the reasonable forseeability test described in **Torres**, supra.. I accept that in human rights law there is an onus on the complainant to mitigate her damages: **Torres**, supra.; **Cameron v. Nel-Gor Castle Nursing Home** (1984), 5 C.H.R.R. D/2170. I find that the onus of proof in respect of

an allegation of a failure to mitigate lies upon the respondents, as it does in other areas of the law: **Red Deer College v. Michaels**, [1976] 2 S.C.R. 324.

The evidence indicates that after her termination from Domtar the complainant engaged in a job search in the Nipigon - Red Rock area. She testified that she applied for various jobs, even where vacancies were not advertised to be available. As well, there is evidence from Ms. Gohm and school board officials which indicates that she had placed her name on the list of supply teachers for school boards in the area, and that she applied for a permanent teaching position but none for which she was qualified became available. The evidence also indicates that her son was born in 1982, and her husband was diagnosed as having cancer in 1983 and that he became progessively more incapacitated during 1986. Ms. Gohm testified that in 1986 she became aware that she would have to seek employment which would allow her to support the family, and she shifted her job search to Toronto.

Counsel for the Company introduced numerous job advertisements that appeared in local newspapers in an attempt to establish that the complainant did not make reasonable efforts to obtain alternate employment. Counsel for the complainant correctly points out that many of these positions were either not in the Nipigon- Red Rock area, or required qualifications that the complainant did not possess. The Company and the Union argued that the complainant should have sought to obtain new qualifications or skills after a period of unemployment, but I

find that this is not a reasonable expectation of a person with two university degrees and considerable and varied job experience.

Counsel for the complainant urged me to find that the complainant could restrict her job search to comparable alternative employment, by which he meant comparable laboratory or technical jobs similar to that which she held at Domtar. I agree that in general the complainant should not be required to shift courses in mid-stream, and that it is reasonable to restrict her job search to positions which were comparable to jobs she had previously held. However, I find that the specific argument with respect to mitigation advanced by counsel for the complainant is not suitable in the circumstances of this case, given the varied job experience of this particular complainant. The evidence indicates that Ms. Gohm was qualified to work as a school teacher, and had done so for one year as well as on a limited basis as a supply teacher, and that she had experience in a variety of positions with the Government of Ontario. Her university training also equipped her to seek employment in some scientific or technical positions, as is revealed by her application for the position of Laboratory Technician at Domtar.

In the light of this I find that in order to establish that the complainant did not make reasonable efforts to mitigate her damages, the Respondents would have to show that she failed to make reasonable efforts to obtain comparable employment to that which she had previously done over the course of her career, includ.

the period prior to her employment by Domtar. On this basis I have reviewed the newspaper advertisements introduced by the Company, and the complainant's testimony in relation to these and in relation to her general job search. This leads me to the conclusion that the complainant did make reasonable efforts to obtain alternate employment in the period immediately following her termination by Domtar, but as time passed she did not apply for many jobs for which she may have been qualified. I should emphasize that my findings in relation to her efforts to mitigate her damages are based on my assessment of her efforts, rather than the actual likelihoof of success of any particular application, and rests upon the testimony of the complainant about the restrictions she placed on her job search with respect to certain employers or employment situations.

I find that it was reasonable for the complainant to restrict her job search to positions in the Nipigon- Red Rock area, on the basis that it is unreasonable to expect a person to seek employment which would involve a lengthy daily commute. The nearest large city where more jobs were available that in Nipigon- Red Rock is Thunder Bay, but the evidence indicates that it is approximately one hour's drive between the two cities, and as a witness from Employment and Immigration Canada testified, that is not considered to be a "normal commuting pattern".

There were several jobs advertised in the Nipigon- Red Rock area for which she may have been qualified, and Ms. Gohm testified that she saw many of these advertisements but chose not

to apply for the jobs. Although there is no means of arriving at a fixed point at time when the complainant's efforts to mitigate her damages ceased to be reasonable other than a somewhat arbitrary assessment based on the evidence, since she did not formally terminate her job search, and though the reasonable forseeability test stated in **Torres** also requires a determination that may appear to be somewhat arbitrary, on the basis of the evidence I find that in the circumstances of this case, and in view of the complainant's personal circumstances, the Respondent's liability for damages caused by their discriminatory act should cease at the end of 1983. There were several positions advertised in this period for which the complainant appeared to be qualified, that she testified she saw advertised, but for which she did not apply. In particular, I am not persuaded that these Respondents should bear responsibility for Ms. Gohm's reluctance to seek a position that might involve weekend or shift work. It may have been that an accommodation could have been arranged which would have enabled Ms. Gohm to obtain one of these positions, and in my view it was unreasonable for her to preclude such jobs from her job search on the basis of her unfavourable experience at Domtar (Trancript, October 13, p. 50).

In these circumstances I find that the complainant's claim for loss of wages should be restricted to the period between October 10, 1981 and December 31, 1983, because after that period I find that her efforts to mitigate her damages had ceased to be reasonable, and furthermore I find that it was not reasonably

forseeable that her efforts would be unsuccessful beyond this period.

I should add here that if I am wrong in my conclusion that the Union is liable to pay one-half of the damages for loss of wages by the complainant, I would hold the Company liable for the full amount.

Counsel for the complainant and the Commission argued that pre-judgment interest on the award for lost wages should be calculated, as has been done by other Boards of Inquiry: **Re West End Construction Ltd. and Ministry of Labour** (1986), 57 O.R. (2d) 391 (H.C.J.); **Cameron v. Nel-Gor Castle Nursing Home**, supra.. The Company and Union argued against this, and they pointed to the delay in processing this complaint, delay which was in no way attributable to their action but solely due to the unilateral decision of the Commission to hold the case in abeyance pending the outcome of the **O'Malley** case. I am persuaded that the delay in this case would render it inequitable to make an award of pre-judgment interest for the full period between October 1981 and this date, because that would increase the liability of the Respondents by a sustantial amount, and would in effect penalize them for the Commission's actions in holding this case in abeyance. For that reason I will award interest only during the period for which the award of damages for lost wages is made, that is between October, 1981 and December 31, 1983. According to sub-section 138(4) of the Ontario Courts of Justice Act, S.O. 1984, c. 11, pre-judgment interest in proceedings such as this

which were commenced prior to the coming into force of the new rules shall be determined according to the rules established pursuant to section 36 of the Judicature Act, R.S.O. 1980, c. 223. Under these rules, pre-judgment interest in this case should be at the Bank of Canada prime rate for the month of September 1981, which was 21.25%.

In my view the delay in handling this case is also relevant to the Commission's request for systemic remedies. Although the remedial authority of a Board of Inquiry is undoubtedly broad enough to encompass systemic remedies in an appropriate case: **Action Travail des Femmes**, supra., I find that the passage of time and the enactment of a substantially revised Human Rights Code renders many of the systemic remedies sought by the Commission inappropriate. I am persuaded, however, that it would be appropriate to order the Respondents to examine their working rules and/or collective agreements in order to identify rules which have the potential to discriminate on the basis of creed because they impose or allow Friday and/or Saturday work schedules, and that they be required to determine what means exist of arranging a reasonable accommodation of any employee's religious requirements. The passage of time and the enactment of the new Human Rights Code have not impaired the usefulness of such an order as a means of preventing the re-occurence of the events which transpired in this case, and for that reason I am prepared to make an order for such a remedy.

Order

Before making my order in this case I would like to note that this was an extremely protracted and occasionally difficult hearing. I would like to commend each of the counsel involved for the professional manner in which they conducted themselves during this process, and to thank them for preparing useful and cogent Memoranda of Arguments for the presentation of legal arguments at the conclusion of the hearing.

1. I order the Respondents, Domtar Inc. and the Office and Professional Employees Intenational Union, Local 267, jointly and severally, to pay to the complainant, Ms. Irene Gohm, damages for lost wages in the amount of $74,331.98 . This sum was calculated on the basis of the wage scales for Junior Laboratory Technicians contained in the Collective Agreements for the period from October 10, 1981 until December 31, 1983, as set out in Exhibit 15:

October 1981 to May 1982	353.70 x 26 weeks
May 1982 to October 1982	417.40 x 24
November 1982 to May 1983	423.44 x 24
May 1983 to October 1983	459.14 x 24
November 1983 to December 1983	465.78 x 8
TOTAL	$51574.44

Plus interest at a rate of 21.25% for 26 months, which equals $22,757.54.

Therefore the total damages awarded in this case are:

$51,574.44 + $22,757.54 = $74,331.98.

2. I order the Respondents, Domtar Inc. and the Office and Professional Employees International Union, Local 267:

(i) to undertake a review of any existing rule, condition, practice or collective agreement which prescribes, authorizes or requires work to be scheduled on Friday evening and/or Saturday at Domtar's Red Rock operation;

(ii) to examine and/or discuss any mechanisms, methods or options that could permit the accommodation of the needs of a person whose creed or religion would prevent him or her from complying with this work schedule because it requires the observance of the Sabbath during Friday evening and/or Saturday; and

(iii) within sixty days jointly to prepare a report on the findings and conlcusions on items (i) and (ii) above, and to submit said report to the Ontario Human Rights Commission.

I so order.

Dated this 18th day of May, 1990.

William F. Pentney
Board of Inquiry